IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	CIVIL ACTION NOS.
	)	99-30225, 99-30226, 99-30227-MAP
	)	(consolidated cases)
Plaintiff,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' REPLY MEMORANDUM IN SUPPORT
OF MOTION TO ENTER CONSENT DECREE

The United States hereby replies to the Memoranda of Law filed in opposition to entry of the Consent Decree which was lodged with this Court on October 7, 1999. Oppositions were filed on behalf of Caroline Church, Dorothy Cohen, Thomas and Frances Ferguson, Abby Kramer Mayou, Gerald and Patricia Reder, Gwendolyn Sears, Tim and Nancy Smith, and the Mildred L. Zimmerman Trust (collectively the "Church Opposition"), the alleged members of the Schaghticoke Indian Tribe and the Housatonic Environmental Action League (collectively the "HEAL/Harrison-Russell Opposition"), and Moldmaster Engineering Incorporated, Vincent Curro, Vincent Stracuzzi, and Sherry Stracuzzi (collectively the "Moldmaster Opposition"). The vast majority of the arguments raised in the Oppositions to entry of the Consent Decree have already been considered and addressed by the United States during the process of responding to comments received during the public comment period. The few issues presented in the

Oppositions, and the rehashing of old arguments, fail to raise any basis to deny entry of the Consent Decree. In short, this Court should enter the Decree because it is fair, reasonable, consistent with the statutory objectives, and in the public interest.

I. The Public Policy Favoring Settlements And The Standard For Judicial Review Of The Consent Decree

As set forth in detail in Argument A.1 of the United States' Memorandum In Support of The Motion to Enter The Consent Decree ("Memorandum in Support"), public policy favors settlement of disputes, and such policy is particularly strong in environmental cases. Id. at 29-31. The various Oppositions do not dispute this strong public policy. Here, where the settlement will allow for comprehensive and expeditious cleanup, substantial reimbursement of government costs, and significant natural resource damage compensation, the legislative objective of achieving prompt settlement and cleanup is achieved.

When evaluating the Consent Decree and the Oppositions thereto it is important to focus on the standard for judicial review of this settlement as described in Argument A.2 of the Memorandum in Support. That is, whether the settlement is fair, reasonable, consistent with statutory objectives, and in the public interest. Id. at 31-32. A settlement negotiated by the United States, such as this one, is entitled to special deference. Id. at 32-33. This Court may simply approve or reject the settlement; it may not modify it. Id. at 33. The Church, Moldmaster and HEAL/Harrison-Russell groups do not try to refute this standard. Accordingly, since the proposed Consent Decree is fair, reasonable, consistent with the goals of environmental laws, and in the public interest, the Court should enter the Decree.

II. The Consent Decree Is Fair, Reasonable, Consistent With The Purposes Of CERCLA, RCRA And The CWA, And In The Public Interest. The Oppositions Fail To Provide A Basis To Reject The Decree

The overwhelming majority of arguments raised by Church, HEAL/Harrison-Russell and Moldmaster in opposition to entry of the Consent Decree have already been considered and addressed in responding to public comments on the Consent Decree -- the Oppositions are merely restating concerns already expressed during the public comment period. In fact, the vast majority of arguments from the Oppositions fail to even acknowledge that the United States responded to identical or virtually identical comments in the Memorandum in Support, and the United States' Response to Comments on Proposed Consent Decree, ("the Response to Comments" or "Comment Response").[1]

For example, a videotape was included as Exhibit D to the Church Opposition. The videotape is an identical copy of the videotape submitted with Housatonic River Initiative's ("HRI") intervention motion (which was withdrawn) and previously submitted by HRI during the comment period and addressed by the United States. Exhibit 1, Comment MA-44. The video was not offered by Church in support of a new objection to, or interpretation of, the Decree, but merely offered to parrot old arguments thoroughly addressed in the Comment Response. Yet, the Opposition fails to respond to the United States' analyses of the arguments which the videotape is ostensibly used to support. For example, the fact that former Pittsfield Mayor Remo DelGallo, a principal speaker on the videotape, has expressed written support for entry of the Decree. Exhibit 18 to Memorandum in Support. The video is but one example of the Oppositions'

[1] The Comments are attached as Exhibit 1 and the Comment Response is attached as Exhibit 2 to the Memorandum in Support.

cavalier treatment, or total disregard, for the United States' Response to Comments. There are only a handful of issues raised in opposition to entry of the Consent Decree that require a more detailed discussion than already set forth in the Memorandum in Support and Response to Comments. These issues include the (1) alleged uncompensated taking of property; (2) alleged preemption of private claims, other than contribution, against GE; (3) the view that GE has an ambiguous commitment to the settlement; (4) alleged failure to require cleanup that is protective of human health and the environment; (5) covenants/statutory construction; and (6) adequacy of the evaluation of natural resource damages ("NRD") and sufficiency of the NRD recovery. As discussed below in the context of the applicable criteria, in particular, substantive fairness, reasonableness, consistency with the statutory objectives, and public interest, the Oppositions' claims fail to establish any justification for rejection of the Decree.

A. The Decree Is Procedurally Fair

The first component of the fairness criterion is whether the settlement is procedurally fair. The Oppositions do not raise any serious challenges to the procedural fairness of the process leading to the proposed Decree. As discussed at length in the Memorandum in Support, the negotiations were extensive and characterized by hard bargaining by all parties. Memorandum in Support at 33-34. The only assertion raised in the Oppositions is that some of the Intervenors should have been at the negotiation table. Church Opposition at 39. As noted, the governments made continuing and extensive efforts to solicit public input to be incorporated into their positions during the negotiations. Id. at 34-37; see also Comment Response 76 and Exhibits 8, 9 and 10 to Memorandum in Support. This is sufficient to satisfy policy and statute. The United States is not required to include the public in its negotiations. Memorandum in Support at 28-29,

38-39; Comment Responses 2-5. The Oppositions do not provide any support for their arguments in caselaw or the statutes at issue. Therefore, there is no reason to go against the clear weight of authority. The settlement is procedurally fair and should be entered.

B. The Decree Satisfies The Criterion Of Substantive Fairness

The second component of fairness is substantive fairness. As noted in Argument A.4 of the Memorandum in Support, this component delves into concepts of corrective justice and accountability. Id. at 40, citing United States v. Cannons Eng'g Corp., 899 F.2d 79, 87 (1st Cir. 1990). Most of the arguments set forth in the Oppositions attempt to refute the substantive fairness of the proposed settlement. Notwithstanding the vigor with which their arguments are made, the Intervenors do not raise serious doubts as to whether the settlement provides satisfactory accountability and justice. It does and should be approved. The various fairness arguments raised by the Intervenors are addressed below.

1. The Takings Arguments Fail To Establish The Decree is Substantively Unfair

Moldmaster and Church claim that entry of the Consent Decree will deprive them of property value because PCBs on their properties as a result of activities by GE will not be cleaned up to levels they assert would otherwise be required under Massachusetts law. Church Opposition at 29-35; Moldmaster Opposition at 2; Moldmaster Intervention at 3-4; Moldmaster Intervention Reply at 4, 8.[2] Moldmaster and Church erroneously contend this alleged deprivation of property value constitutes a "taking" under the Fifth Amendment without just compensation. Id. Thus, they contend the Decree is substantively unfair.

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[2] The Moldmaster and Church Intervention papers are cited because they are incorporated by reference in Moldmaster's Opposition at 1 and 3.

As explained below, there is a jurisdictional bar which precludes this Court from considering the theoretical takings claims of Moldmaster and Church.[3] But even if there were no jurisdictional bar there is no compensable taking; entry of the Decree should benefit, not devalue, the property at issue. Finally, if the Interveners believe that implementation of the Consent Decree results in a takings, a forum to recover the constitutional "due" - just compensation, is available. Therefore, these claims do not justify rejecting the Decree.

a. This Court Has No Jurisdiction to Consider Taking Claims And Other Forums Are Available

The jurisdiction of federal district courts to address claims for just compensation against the United States under the Fifth Amendment is set out in the "Little Tucker Act," 28 U.S.C. § 1346(a)(2) (1982). That statute confers federal district courts with jurisdiction over civil actions against the United States "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress." Id. Such claims against the United States exceeding this $10,000 jurisdictional limit fall within the exclusive jurisdiction of the United States Court of Federal Claims ("Claims Court") under the "Big Tucker Act," commonly known simply as the "Tucker Act," 28 U.S.C. § 1491. See Charles v. Rice, 28 F.3d 1312, 1321 (1st Cir. 1994); New Mexico v. Regan, 745 F.2d 1318, 1322 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

In determining whether a district court may exercise jurisdiction over a particular claim under the Little Tucker Act, "[p]laintiffs seek[ing] to invoke the subject matter jurisdiction of the federal district courts bear the burden of alleging that their claims do not exceed the $10,000

[3] Also see Memorandum In Support Of Response Of The United States To Motions To Intervene By Moldmaster Engineering, The Housatonic River Initiative, And Caroline Church, And In Support Of Entry Of A Case Management Order ("United States' Opposition To Intervention").

jurisdictional limit established by the Tucker Act." Enplanar, Inc. v. Marsh, 829 F. Supp. 848, 851 (S.D. Miss. 1992) (emphasis added), aff'd, 25 F.3d 1043 (5th Cir.), cert. denied, 513 U.S. 926 (1994). There is no such allegation in any of the Moldmaster or Church pleadings.[4]

Accordingly, their claims fall within the exclusive jurisdiction of the Claims Court pursuant to the Tucker Act. See, 28 U.S.C. § 1491(a)(1); United States v. Fisher, 864 F.2d 434, 438-39 (7th Cir. 1988) (if any takings occurs as a result of access granted to EPA to investigate site contamination, the landowner's sole remedy lies under the Tucker Act); B.F. Goodrich v. Murtha, 697 F.Supp. at 98 n. 14 (same); United States v. Ciampitti, 615 F. Supp. 116, 121 (D.N.J. 1984), aff'd, 772 F.2d 893 (3d Cir. 1985), cert. denied, 475 U.S. 1014 (1986); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 71 n.15 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 126-27 (1974); Persyn v. United States, 935 F.2d 69, 72 (5th Cir. 1991).

In an effort to surmount the jurisdictional bar, Moldmaster argues entitlement to injunctive relief. Moldmaster claims the alleged inadequacy of the cleanups selected by EPA entitles it to injunctive, in lieu of monetary relief. Moldmaster requests a court order requiring cleanup beyond what is required by EPA. Moldmaster Reply at 6, 8.

First, such requests for injunctive relief do not provide a means to evade the jurisdictional limitation of the Little Tucker Act. The jurisdictional requirement cannot be skirted by appearing

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[4] Moldmaster could maintain the claims in district court only if they are willing to waive their right to recover more than the $10,000 jurisdictional limit. Smith v. Orr, 855 F.2d 1544, 1553 (Fed. Cir. 1988). See also Chabal v. Reagan, 822 F.2d 349, 357 (3d Cir. 1987); Stone v. United States, 683 F.2d 449, 451 (D.C. Cir. 1982); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 393 n.6 (9th Cir. 1979). Note that, although Church raises the takings arguments, Church's complaint contains no takings claims.

to seek only injunctive relief against the government or through artful pleading or phraseology. See id.; Amoco Prod. Co. v. Hodel, 815 F.2d 352, 361 (5th Cir. 1987) cert. denied, 487 U.S. 1234 (1988); Hoopa Valley Tribe v. United States, 596 F.2d 435, 436 (Ct. Cl. 1979). When the essential purpose of the complaining party is to obtain money from the federal government in excess of $10,000, the exclusive jurisdiction of the Claims Court is triggered. New Mexico v. Regan, 745 F.2d at 1322. It follows that Moldmaster's alternative claims for relief seeking recovery of more than $10,000 and injunctive relief fall outside the jurisdiction conferred by the Little Tucker Act.[5]

Further, where, as here, jurisdiction over a claim for just compensation lies in the Claims Court under the Tucker Act, that process must be exhausted. Any takings claim against the United States is "premature until the property owner has availed itself of the process provided by the Tucker Act." Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990) (*quoting* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985)).

In short, Moldmaster's and Church's assertion that the proposed Consent Decree effects a taking of their property is not a claim within the jurisdiction of this Court under 28 U.S.C. § 1346(a)(2). Moldmaster and Church may pursue their allegations of takings and property damage against the government in the Court of Claims,[6] or against GE through private party

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[5]Moldmaster argues that its claim for injunctive relief is not available in the Court of Claims under the Tucker Act. Moldmaster Reply in Support of Intervention at 5, 6. This is not true. Claims for injunctive relief may be pursued under the Tucker Act if the equitable relief is ancillary, as in this case, to the claims for monetary relief. Favereau v. United States, 44 F. Supp. 2d 68 (D. Me. 1999).

[6] In short, this Court may enter the Decree without prejudice to Moldmaster's and Church's takings claims in the Court of Claims. Outboard Marine Corp. v. Thomas, 610 F.Supp. 1234, 1240 (N.D. Ill. 1985) (absence of compensation prior to EPA "taking" of private land does

action.[7] Because Moldmaster's and Church's claims are not properly before this Court and because they have other avenues to pursue their takings and property damage claims, such alleged claims present no reason to withhold entry of the proposed Consent Decree.

Moreover, Moldmaster's and Church's arguments are without merit. In order to provide a comprehensive record for the Court and to facilitate a ruling on the Motion for Entry, the United States briefly addresses the "substance" of the Oppositions' arguments. If the court agrees with the United States that there is no reason to look beyond the jurisdictional bar, the court need not read the following section.

b. The Value of Property Subject to the Consent Decree Should Be Enhanced, Not Diminished, By Entry of the Consent Decree

The merits of the takings claims are not before this Court because of the jurisdictional bar, nonetheless, entry of the Decree likely will have a positive (not a negative) effect upon property and property values within the Site.[8] All contaminated property subject to the Decree, including such Church and Moldmaster properties, will be subject to an intensive sampling

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not violate Fifth Amendment, because Tucker Act suit for compensation can be brought subsequent to the alleged taking); United States v. American Color and Chemical Corp., 858 F.Supp. 445, 454 (M.D. Penn. 1994) (same).

[7] See discussion on contribution protection and preservation of claims at Section II.B.2.

[8] Moldmaster attempts to make much of the United States' and the Commonwealth's purported acknowledgment of the decrease in property value based upon the governments' responses to the motions for intervention. Moldmaster Opposition at 2. The United States has not previously addressed the merits of the takings claims raised in Moldmaster's intervention briefs for two reasons. First, the bar precludes the monetary claim in this Court and precludes a claim for injunctive relief as a result of a claimed taking. Second, it was inappropriate to address the merits of the intervention complaints in connection with briefing the issue of whether to grant intervention status. Conservation Law Found. v. Mosbacher, 966 F.2d 39, 43 (1st Cir. 1992)(In deciding a motion to intervene, " [t]he question before us is not the merits of the consent decree . . .").

regimen and will be cleaned to the point where EPA can certify that the cleanup is protective of human health and the environment.[9] All this will be accomplished at no expense to the property owner. Accordingly, entry of the Decree should add to, and not diminish, the value of property by returning the property to a condition where, for example, EPA can certify that the cleanup at the property is not a threat to human health and the environment.

Nonetheless Church and Moldmaster claim a governmental taking of property based on three arguments: (1) the owner may elect to place an easement on the property for which the owner will receive compensation from GE; (2) although EPA will certify the cleanup at each property is protective of human health and the environment, residual PCB contamination will remain on the property above the Massachusetts default standard of 2 ppm, and this cleanup will diminish the current value of the property; and (3) other aspects of EPA's cleanup decisions are inadequate and will result in the diminishment of the current property value. Church Opposition at 29-35; Moldmaster Opposition at 2; Moldmaster Intervention at 3-4; Moldmaster Intervention Reply at 4, 8. None of these theories presents a cognizable takings claim.

i. The Easement Is Optional And Only The Property Owner Decides Whether The Compensation Offered By GE Is Adequate.

Church and Moldmaster claim placement of an easement on their property will constitute

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[9] To the extent that Moldmaster implies certain property is being singled out for less favorable treatment under the Consent Decree, such an implication is not accurate. All non-GE commercial property including the properties of the Moldmaster group, is treated alike. See EPA's Action Memorandum for Removal Actions Outside the River, Appendix D to Decree; Memoranda regarding "Protectiveness of Cleanup Levels for Removal Actions Outside the River -- Protection of Human Health" and "Protectiveness of Cleanup Levels for Removal Actions Outside the River -- Protection of Ecological Receptors", which are Attachments A and B, respectively, to Appendix D to Consent Decree; and Memoranda regarding protectiveness for the Upper Two Mile Reach Removal Action attached hereto as Exhibit A and B.

a taking. Of course, Church and Moldmaster may pursue a claim for just compensation under the Tucker Act as discussed above. But, even within the contours of the Decree itself, two choices exist. As described below, property owners can choose, at their discretion, between a "Compensated Easement" or a "Conditional Solution."[10] Thus, property owners may choose the scenario that best suits their individual circumstances. Neither the Conditional Solution[11] nor the Compensated Easement results in a taking.

Under the Compensated Easement option, GE will undertake a cleanup of the affected property to be protective of the current use of the property. GE will then compensate the owner for recording an easement on the property which effectively freezes the current use of the property.[12] In consideration for placing an easement on the property, GE must offer to pay the property owners either 18% of the tax assessor's value of the property, or the estimated fair

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[10] These alternatives are described in more detail in Comment Response 51.

[11] Pursuant to the Conditional Solution option, GE will undertake cleanup of the affected property to be protective of any current or legally permissible future use of the property. For example, property currently used for commercial purposes will be cleaned to be protective of commercial use of property. If and when future use of the property changes to residential use, GE must implement further response actions to ensure the property is protective of that residential use. The standard for residential cleanup of PCB contamination under the Decree is the same as the Massachusetts default standard, 2 ppm. See Comment Response 51 for a more detailed description of the Conditional Solution option. The only obligation on the property owner is to submit certain documentation to GE regarding the intended change in use prior to GE's obligation to undertake cleanup for the new use. Thus, an owner controls the use of his/her property under the Conditional Solution alternative because GE must undertake whatever cleanup measures are appropriate to ensure the protectiveness of the property for its current and legally permissible future uses.

[12] Under certain conditions, the owners can nonetheless request an amendment and release of, or act under exceptions to, the easement. The easement also permits a limited amount of digging and excavation on this property. Appendix O to Consent Decree at 10-13, and 19-20.

market value of the easement based upon the average of three appraisals.[13] If a property owner believes the compensation offered by GE is inadequate, the property owner may decline to place the easement on the property, in which case a conditional solution cleanup will apply.

Moldmaster makes two arguments with respect to the Compensated Easement. First, Moldmaster claims, to date, that GE has refused to offer Moldmaster owners any compensation. Yet, until the Decree is entered, GE is under no obligation to perform the cleanup, request the easement, or offer compensation. Upon entry of the Decree, however, GE is required to comply with the Decree's terms, or be subject to stipulated penalties and enforcement action. In evaluating the propriety of the settlement, the United States and this Court should assume that GE will comply with its obligations.[14]

Second, Moldmaster claims that the Compensated Easement alternative constitutes an "admission" that there is a physical taking of property without just compensation. In the first place, no property owner is required to place the Compensated Easement on their property. In the second place, if an owner elects this option, he/she will be compensated in exchange for the restrictions on the property. In the third place, if the owner declines the Compensated Easement option, the property will be addressed as a Conditional Solution.

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[13] GE may choose which value to offer the property owner, and GE must pay for the cost of the appraisals. See Comment Response 51 and the Consent Decree at ¶ 60.a. for a more detailed description of the appraisal process.

[14] Similarly, Church claims property owners have been unable to sell their property because of contamination. Church Opposition at 35. This argument seems more directed at the existing contamination than to the Decree. Until the Consent Decree is entered the property will not be subject to cleanup. Then, the cleanup obligations should facilitate the sale of such property.

Under the Compensated Easement, the previously unsafe contaminated property is benefitted by the cleanup to a protective level for the current use of the property and the owner is compensated for placing an easement on the property. There is no cognizable taking claim when an owner elects to limit use and receives compensation for such limitations.

ii. Adopting A Protective Cleanup Standard Which Differs
From the Massachusetts Default Standard Fails To Constitute A Taking

Church and Moldmaster argue EPA's decision selecting cleanup levels less stringent than the Massachusetts default standard will result in a taking. In particular, Church and Moldmaster suggest that under either the Conditional Solution or Compensated Easement scenario there is diminishment of property value because non-residential property will not be cleaned to the residential level, the Massachusetts default standard of 2 ppm, unless the property is being used as a residence. Church concedes it may be appropriate to differentiate cleanup requirements for different kinds of property, i.e., different cleanup levels for residential compared to commercial property. Yet, without any relevant support, Church claims EPA's selected cleanup levels for non-residential property are inadequate.[15] These arguments also suggest the settlement is not reasonable because it will not facilitate an appropriate clean-up. The following discussion of the

[15] Church claims Newell Street is an example where it is difficult to establish cleanup levels because the "area is home to the workers and management of Moldmaster Engineering, the members of the Italian American Club, an active social club, and borders many homes." Church Opposition at 32. This is exactly the kind of site-specific information EPA considered in conducting its risk evaluations for the Site. See Memoranda Regarding Protectiveness, Attachments A and B to Appendix D to Consent Decree. As a result, EPA determined, for example, that the Italian American Club will be cleaned to recreational and not commercial standards. Homes bordering Newell Street are not included in the definition of the Site and have been or will be cleaned up under the Massachusetts Department of Environmental Protection ("MADEP") residential program. There is no claim that EPA ignored pertinent information in selecting cleanup levels, only that property owners wish EPA's conclusions were different.

technical sufficiency of EPA's decisions also should be considered in connection with Section II.C.

EPA is vested with statutory and regulatory authority to select a remedy to be protective of human health and the environment at this Site. Risk evaluations, including a review of Site specific exposure information and assumptions, were undertaken by EPA to determine the appropriate clean-up levels for commercial and recreational properties at the Site. Such risk evaluations were undertaken for the Removal Actions Outside the River. See the Memoranda regarding "Protectiveness of Cleanup Levels for Removal Actions Outside the River -- Protection of Human Health" and "Protectiveness of Cleanup Levels for Removal Actions Outside the River -- Protection of Ecological Receptors", both of which are attached to Appendix D to the Consent Decree. EPA relied upon risk evaluations in selecting a removal action for the Upper ½ Mile Reach. See also the Memoranda entitled "Evaluation of Human Health Risks from Exposure to Elevated Levels of PCBs in Housatonic River Sediment, Bank Soils and Floodplain Soils in Reaches 3-1 to 4-6" and "Upper Reach -Housatonic River Ecological Risk Assessment," attached hereto as Exhibits A and B, respectively, and relied upon in EPA's decision document selecting the Upper ½ Mile Reach Removal Action attached as Appendix B to the Consent Decree at 3.[16] See also Memorandum in Support, Exhibit 11. The protectiveness of the Site clean-ups has been addressed in Argument A.5 of the Memorandum in Support and

[16] Cleanup standards and other Performance Standards for the Rest of River will also be based on the human health and ecological risk assessments being performed for the Rest of River. Decree, Appendix G, Section II.A-J. Such standards will be subject to public comment, pursuant to 40 C.F.R. Part 124 and Decree Appendix G, Section II.J. Following opportunity for public comment, and selection by EPA of Performance Standards and corrective measures for the Rest of River, EPA's selection will be subject to review by the EPA Environmental Appeals Board and the United States Court of Appeals. 40 C.F.R. § 124.19.

Comment Responses 53-57, and are further discussed in Section II.C of this Memorandum.[17] Following EPA's Site-specific analysis, EPA determined that the Massachusetts default standard, which was developed to be protective of the most sensitive uses (such as a residence), is more stringent than required for commercial and recreational properties at this Site.

The Church Opposition suggests that if the cleanup were implemented under Massachusetts law, a more stringent cleanup would be required. In effect, the Opposition contends that a "property entitlement" exists to the 2 ppm standard by reason of Massachusetts law. But Massachusetts has spoken differently. First, MADEP has endorsed the Consent Decree. Second, under Massachusetts regulations, MADEP and/or PRPs may undertake site

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[17] The EPA Site-specific risk evaluations for the Removal Actions Outside the River have not been technically questioned, analyzed, critiqued or mentioned by any expert for the Oppositions. As to the Upper ½ Mile Reach, Church has submitted an exhibit that consists of two undated, unsigned documents purportedly prepared by Joel Loitherstein of Loitherstein Environmental Engineering, Inc. ("LEEI") which is the technical consultant of HRI. The documents, entitled "Questions Developed by Housatonic River Initiative (HRI) and Answers By LEEI." And "Questions Developed by HRI and LEEI for BBL and GE"). The exhibit consists of a question and answer format and makes no reference to any documents that are part of the Administrative Record. The documents appear to have been submitted after EPA's February 1999 solicitation of public input on GE's January 1999 draft work plan for the Upper ½ Mile Reach but perhaps as late as May 1999. Thus, the information in the submittal appears to predate the August 1999 final Upper ½ Mile Reach Removal Action Work Plan (Appendix F to Consent Decree) that includes changes based in part on input from the public. The submittal also predates the October 1999 Responsiveness Summary which addressed comments received regarding the proposed Upper ½ Mile Reach Removal Action. The Response to Comments also is responsive to the comments raised in the LEEI submittal. Comment Response Sections II.C and III.A-I. Where LEEI's opinions differ from EPA there is insufficient basis to determine why LEEI reached its conclusion and why LEEI believes EPA reached the wrong result. As set forth in Paragraph 4 of the Case Management Order, and applicable case law, review of EPA's cleanup decisions is limited to the Administrative Record. See Memorandum in Support at 53-54, fn 39. Clearly, the Oppositions have raised no expert or other refutation of EPA's risk evaluations based on the Administrative Record that would warrant this Court refusing to enter the Consent Decree.

specific risk analyses to develop cleanups which may differ from the default standard.[18] That is what was done here.

A technical decision by EPA regarding the selection of response actions is subject to judicial deference and should be upheld unless it is arbitrary and capricious based upon a review of the administrative record. 42 U.S.C. § 9613(j)(2). United States v. Vertac, 33 F. Supp.2d 769, 783 (E.D. Ark. 1998) ("Courts are required to uphold the EPA's response decision unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary, capricious or otherwise not in accordance with the law." (citations omitted)); see also Memorandum in Support at 53-4, fn 39, and Comment Response 54. Accordingly, this Court also should defer to EPA's technical expertise and uphold EPA's cleanup decisions.

In terms of a takings claim, even if some contamination remains, the value of the property should be enhanced because it has been cleaned to protective levels. Under such circumstances, there is no basis for compensation and this Court should enter the Decree.

iii. Other Technical Aspects of EPA's Cleanup Fail To Constitute A Taking

In claiming the Decree will result in a taking and therefore that it is unfair, Church raises two additional theories based upon EPA's technical cleanup decisions for the Site. This Court should consider these technical issues with the same deference owed any of EPA's technical decisions. Memorandum in Support at 54, fn 39.

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[18] See generally 310 CMR 40.0990 for the Massachusetts Contingency Plan (the "MCP") provisions regarding site specific risk characterization. Under the MCP, for soil contamination, a Potentially Responsible Party (or MADEP) may opt to use either a site specific approach (called Method 3 in the MCP) or a more generic approach using standards promulgated in the MCP (called Method 1 in the MCP, or called "default" levels by Plaintiff interveners). See 310 CMR 40.0902(2).

First, Church claims that the Decree lacks an adequate sampling regime, which contributes to lack of public health protection and a decrease in property value. Church Opposition at 32. Again, no cases are cited and no expert opinion based on the Administrative Record is offered to rebut EPA's conclusion that the current sampling plan and grid required by the Consent Decree are adequate and protective. There is simply no basis to second guess EPA's technical determination regarding the sufficiency of the grid sampling program to detect hotspots or to otherwise address contamination. See Comment Response 53.

Second, Church contends that unknown contamination may negatively affect property value in the future without recourse against GE. Church Opposition at 32-35. This claim is purely speculative based on some future event that has not occurred, and also fails to consider the reservations of rights, or "re-opener provisions," of the Consent Decree which require GE to undertake or pay for further cleanup if previously unknown conditions are discovered which show that a cleanup is not protective of human health or the environment.[19] In short, there is no cognizable takings claim against the government based upon unknown contamination caused by GE.

c. The Takings Arguments Are Fundamentally Flawed And Do Not Compromise Substantive Fairness

In sum, the fundamental theory of all these takings arguments is fatally flawed. It is difficult to imagine a compensable takings claim where the source of the contamination is a private party; where the government certifies that clean up of property is protective; where the owner has the option of additional cleanup or compensation for use limitations; where the

[19] Decree Paragraphs 162 and 163; also see Comment Response 13.

responsible party must undertake or pay for further response actions if unknown conditions are discovered to show that the cleanup is not protective; and there is no cost to the owner to perform the cleanup selected by EPA. See,, e.g., Nassr v. Com., 394 Mass. 767, 477 N.E.2d 987 (1985) (No takings claim for rent during the time the government occupied the property for the purpose of remediating contamination). Church and Moldmaster claim entitlement to a "cleaner" cleanup, yet there is no cognizable action against the government for more cleanup than what is necessary for protectiveness. Otherwise, any person with non-threatening or background contamination on their property could receive compensation from the government.

Neither common sense nor case law supports such an approach under the Tucker Act. The cases cited by Moldmaster are easily distinguished. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a governmental zoning change prevented any building on the property thereby depriving the owner of all economic value in the property. Similarly, in United States v. Causby, 328 U.S. 256 (1946), Branning v. United States, 784 F.2d 361 (Fed. Cir 1986), and Griggs v. County of Allegheny, 369 U.S. 857 (1962), airline traffic limited the use of property. In none of the cases cited by the Opposition did the government confer any direct, unique benefit to the property owner, such as remediation of contamination.

Further, Moldmaster fails to mention two governing principles in takings jurisprudence. First, there is no cognizable takings claim when the government abates a nuisance in the interest of public health. Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232, 1245, 480 U.S. 470 (1987) (ordinarily, no taking when acting to protect the public interest in health and the environment). Second, there is no cognizable takings claim when the benefit of government action outweighs the burden. Id., at 1245 (no compensation required for actions that provide

more benefit than harm to owner); Hendler v. United States, 175 F.3d 1374, 1382-83 (9th Cir.1999) (no compensable taking where the problem was not created by the government and the remediation of groundwater conferred a benefit which offset any nominal adverse impact from EPA access and groundwater wells).[20] Here, entry of the Decree will both abate a threat to public health and confer a benefit on the property by causing contamination to be addressed. Even if the Decree does not return the property to pristine condition, it is still a substantial improvement in condition and value.

After entry of the Decree and completion of GE's cleanup work, EPA will certify that the cleanup on the property is protective. Thereafter, the owner may use the property for legally permissible uses pursuant to the Conditional Solution, or, at the owner's choice, the owner may receive compensation for agreeing to limitations on the use of such property. In conclusion, because the Court has no jurisdiction to consider takings arguments, because the Decree will very likely benefit the value of the property by rendering its current and future uses protective, and because the Intervenors have future relief available should a compensable taking occur, this Court should enter the Consent Decree.[21]

2. The Decree Is Substantively Fair Because Non-Contribution

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[20] If the Court is inclined to consider these takings issues, despite the jurisdictional bar, the United States requests the opportunity to more fully brief the merits of the takings claim.

[21] Church also claims that entry of the Decree will deprive property owners of property without due process of law because property owners were not at the negotiating table. Church Opposition at 35, Section II.A., infra, and Comment Response 4 address the propriety of confidential government negotiations. Further, cases do not support due process claims where the cleanup decisions and the settlement, such as in this case, are subject to public comment. United States v. Seymour Recycling Corp., 679 F.Supp. at 864-65 (S.D. Ind.1987) (opportunity to comment on remedy selection and judicial review thereof satisfies due process).

Claims And Injunctive Relief Against GE Are Preserved

Moldmaster and Church also argue that the proposed settlement is not substantively fair because, if entered, it will 'preempt' Moldmaster's claims pending before this Court in Civil Action Numbers 96-30177-MAP and 97-30230. There is also the suggestion that future claims could be precluded. Moldmaster Intervention Reply at 2; Moldmaster Opposition at 1; Church Intervention at 30-31. Contrary to the assertions of the Intervenors, the scope of contribution protection for GE under the settlement is circumscribed.

Most of the arguments raised by Moldmaster and Church as to the scope of contribution protection simply repeat comments filed as to the Consent Decree during the public comment period. Those arguments have no more force in repetition than they did when first made. As set out in detail at 49-51 of the Memorandum in Support and Responses to Comment # 21(A)-(D), 22, and 23, the Consent Decree preserves all of Moldmaster's and Church's claims against GE other than claims for contribution. See also Massachusetts Original Memorandum in Support of Entry and Massachusetts Reply in Support of Entry. Indeed, specifically to address concerns like those of the Intervenors, the Decree includes Paragraph 196 stating the Parties' intent not to affect the rights of persons for causes of action beyond those described in the Decree. Further, the Decree explicitly states that contribution protection only extends to the "matters addressed". Decree Paragraph 191. This does not affect the viability of claims that are not related to the Site or claims that are not among those addressed by the settlement. Thus, claims for property damage, trespass or personal injury (as to Site and non-Site properties) are not affected by entry of the proposed Consent Decree.

While cost recovery claims for additional clean-up more stringent than that selected by

EPA are not directly barred by the settlement, it is important to remember that EPA has determined the cleanups, when implemented and completed in accordance with the Decree and relevant work plans, will be protective of human health and the environment. Decree Paragraph 8.b Thus it may be difficult for a party to prove that additional work is a necessary cost of response pursuant to 42 U.S.C. § 9607(a)(4)(B). See also M.G.L. c.21E §4. Even if a party is unable to pursue such claims, however, the Decree is substantively fair. Moreover, as noted above, the owner may be able to pursue other claims such as property damage, trespass or personal injury. Finally, as discussed in Section II.B.1, concerns regarding takings may be pursued in other forums.

In the context of a decision on entry of the Decree, this Court should not feel compelled to divine every possible future event that may be impacted by the Decree. See Memorandum in Support at 50-51 and Comment Response 22. The contribution protection provisions conform to the statutory objectives and are substantively fair to GE as well as persons not party to the settlement.

3. The Covenants Not To Sue GE Are Substantively Fair

Church argues that the Consent Decree is unfair and should not be entered because, in Church's view, the government cannot extend GE covenants not to sue for removal actions. Church Opposition at 5, 6. This argument adds little to the comment that was considered and addressed by the United States in the Memorandum in Support at 45-48 and in Comment Response 11. The covenants are fair and consistent with CERCLA.

In short, Church argues that since Section 122(f) of CERCLA, 42 U.S.C. § 9622(f), provides specific language regarding the scope of covenants not to sue for CERCLA remedial

actions, providing covenants not to sue for settlements involving other than remedial action is prohibited. Church is simply wrong. While Section 122 of CERCLA provides explicitly for covenants not to sue for settlements implementing remedial actions, that provision does not prohibit the United States from providing covenants not to sue in other appropriate circumstances, such as those in the proposed Consent Decree. The Attorney General's exclusive power to conduct litigation in which the United States is a party, 28 U.S.C. § 516, includes the discretion to settle cases and/or enter into consent decrees on any appropriate terms. See Swift & Co. v. United States, 276 U.S. 311, 331, 332 (1928). This power is limited in only one respect; where other statutes provide an express limit. See 28 U.S.C. § 516. Section 122(f) of CERCLA provides such an express limit, but only for settlements involving *remedial* action. In cases of *removal* actions under CERCLA, the Attorney General's broad power to settle lawsuits on appropriate terms applies undiminished. See Memorandum in Support at 48 and Comment Response 11.

The Church Opposition argues that since Congress made a clear distinction between *removal* and *remedial* actions, its choice of the latter term in Section 122(f) evidences congressional intent "to circumscribe the conditions under which the United States is authorized to grant covenants not to sue". Church Opposition at 6. Church then cites as support the canon that 'all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.' Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999), quoting United States v. Ven-Fuel Inc. 758 F.2d 741, 751-52 (1st Cir. 1985). While the United States agrees that this is a primary rule of statutory construction, the United States

vigorously disputes the conclusions drawn by Church.

The Eighth Circuit Court of Appeals has specifically noted that Section 122(f) of CERCLA is an affirmative grant of settlement authority as opposed to any limitation on the power of the Attorney General to settle litigation. United States v. Hercules Inc., 961 F.2d 796, 800 (8th Cir.1992). The Court in Hercules was faced with a similar argument about the authority to grant covenants but with respect to CERCLA's cost recovery provisions and found that "CERCLA § 122 does not clearly and unambiguously limit the Attorney General's plenary authority over the control and conduct of litigation in which the United States is a party. Id. at 799. Accordingly, Section 122(f) does not preclude the United States' ability to provide appropriate covenants not to sue for removal actions. Church does not address Hercules or the Eighth Circuit's analysis therein. This Court should adopt that analysis.

Moreover, to hold otherwise would render meaningless Congress' intent to encourage settlement of all CERCLA claims, not just CERCLA remedial action claims. United States v. Cannons Eng'g, 899 F.2d at 94; In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1031, fn 21 (D. Mass. 1989); Memorandum in Support at 29-31. If Congress were to have set up two sets of response actions under CERCLA – removal and remedial actions – and yet only provide the opportunity for offering covenants not to sue for matters involving remedial actions, the effect would be to prohibit or limit settlement of all non-remedial action claims. Such a prohibition or limitation of settlement opportunity would be directly contrary to the stated intent of encouraging settlement of Superfund claims. Just as the Eighth Circuit found with respect to settlement of CERCLA cost recovery actions, here the United States' ability to make appropriate settlements for CERCLA removal actions is not precluded by the express language of

Section 122(f). Thus, the settlement is fair and consistent with the statutory schemes of CERCLA, RCRA and the CWA.

4. Cost Recovery Under the Settlement Demonstrates Substantive Fairness

While the Oppositions raised many questions concerning the substantive fairness of the proposed Decree, none of the intervenors raised issues relating to the level of the governments' cost recovery. The United States will recover a substantial amount of its past and future response costs related to the Site: in excess of $70 million plus a significant percentage of costs for the 1 ½ Mile Reach Removal Action. Memorandum in Support at 42-45. This recovery weighs heavily in favor of a finding of substantive fairness.

Accordingly, an evaluation of the settlement in light of the Oppositions demonstrates that the Decree is both procedurally and substantively fair. It should be approved and entered by the Court as a final judgment.

C. The Decree Is Reasonable Since It Provides an Effective Vehicle for Site Cleanup

As set forth in Argument A.5 of the Memorandum in Support, the second criterion for evaluating an environmental settlement is whether it is reasonable. Id. at 53. Reasonableness has three components: efficacy as a tool to clean the environment; ability to satisfactorily 29

The Oppositions attack the technical adequacy of the cleanups to be implemented pursuant to the settlement, thus claiming the Decree is unreasonable. EPA's cleanup decisions are protective and supported by the Administrative Record. As a rule, courts defer to EPA's technical selection of cleanup alternatives under an arbitrary and capricious standard based upon the administrative record. Id. at 54, fn 39.

Many of the technical objections to the Decree seem to argue that the Consent Decree does not meet the standard for reasonableness because the cleanup will not remove every molecule of contamination from the Site and therefore is arguably not fully protective of human health and the environment. Church Opposition at 9-38; HEAL/Harrison-Russell Opposition at 3, 4. There is no foundation to support such claims. To further national consistency in cleanup levels and to comply with the statutory requirements of CERCLA and the NCP, EPA chooses among cleanup alternatives based on merit regardless of the ability of a responsible party to pay for the selected remedy. EPA has selected a set of cleanups which is cost effective while meeting the goal of protectiveness for human health and the environment. If all treatment measures requested by the Interveners were implemented instead of the proposed response actions at the Site, the treatment measures would, using the Interveners' estimates, cost nearly $500 million. In these circumstances, where other response actions are sufficiently protective, such additional costs are not justified under CERCLA, RCRA, or the Clean Water Act. In short, none of the technical comments show that the Decree is unreasonable due to technical inadequacies. Various of the objections are addressed below.

1. EPA's Decision On Groundwater Is Not Arbitrary Or Capricious.

Church argues that the Consent Decree should not be entered because the cleanup selected assumes groundwater in the City of Pittsfield (the "City") will never be used.[22] Without any discussion of the relevant criteria for decisionmaking, Church "questions the wisdom and long-term efficacy" of the decision to forego future use of groundwater. Church Opposition at 38. Church also argues that the Agencies are mistaken in their belief that the City has sufficient alternate sources of drinking water such that it will not have to use groundwater.

These objections have been considered and addressed by the United States in Comment Response 52. In sum, the United States' decision concerning groundwater is supported by the technical data and regulatory requirements.[23] The groundwater cleanup performance standards in the Decree are appropriate based upon the City's current and foreseeable use of surface water for drinking water, as well as state and local regulations. The GE Plant Area is neither a Current nor Potential Drinking Water Area, as defined by state regulations, and the City's Well Drilling Regulations provide that the use of any existing private wells located in the GE Plant Area must cease immediately. While the decision not to allow the future use of groundwater at the GE

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[22] Church Intervention at 22; Church Opposition at 36-38.

[23] Church cites Utah v. Kennecott Corp., 801 F. Supp. 553, 568-69 (D. Utah 1992), as support for Church's claim that the Consent Decree's requirements for groundwater actions by GE are inadequate. However, that case differs substantially from the case at bar. Initially, the United States was not a party to the Kennecott case. Moreover, in Kennecott, appropriate cleanup requirements were not the issue, but rather the appropriateness of a monetary settlement for natural resource damages claims. Finally, in Kennecott, because the State had not followed federal regulations in making its natural resource damage determinations, the court reviewed the settlement using the preponderance of the evidence standard. In the instant case, EPA followed appropriate requirements in selecting response actions, and EPA's groundwater decisions are certainly not arbitrary and capricious or otherwise not in accordance with law.

Plant Area as a drinking water source is not one to be made lightly, it is an acceptable cleanup solution and is reasonable in this case.

As to the availability of alternate sources of drinking water, the City's Reply brief in support of the Decree demonstrates that the current source of drinking water is more than adequate for current demand. The information cited in the Church Opposition at pages 37-38 is dated and does not reflect the City's current plans.

2. The Decision To Exclude The West Branch of the Housatonic River From The Site Is Reasonable

Church argues that the Consent Decree should not be entered because it fails to require cleanup of the West Branch of the Housatonic River.[24] This argument has been considered and addressed by the United States in Comment Response 66. The current scope of the Site and the settlement is a reasonable exercise of the government's discretion under the environmental statutes. Should further investigation establish that response actions for the West Branch or other non-Site areas are appropriate, they are not precluded by the proposed settlement.

3. EPA's Decisions Relating to Hill 78 and Building 71 Landfills/Additional Treatment Reflected Consideration Of The Technologies Suggested By The Intervenors

Church argues that the Consent Decree should not be entered because it permits hazardous wastes to be disposed of at the Hill 78 and Building 71 Landfills.[25] Church and HEAL/Harrison-Russell argue that the Consent Decree should not be entered because, they

[24] Church Intervention at 22; Church Opposition at 27-28.

[25] Church Intervention at 22; Church Opposition 16-23.

assert, treatment is a preferred alternative to containment of contamination.[26] The arguments regarding Hill 78 and Building 71 Landfills have been considered and addressed by the United States in Section II.B. of the Comment Response, including Comment Responses 40-49. Contrary to the Intervenors' assertions that thermal desorption has not been considered by the United States, the argument for additional treatment, including thermal desorption, instead of consolidation has been considered and addressed. Comment Response 40.[27]

4. EPA's Decisions For The Silver Lake Cleanup Are Appropriate

Church argues that the Consent Decree should not be entered because residual PCB contamination will remain in and around Silver Lake.[28] This argument has been considered and addressed by the United States in Comment Response 61(A)-(E). The cleanup levels are protective and the selected technologies will be effective.

5. EPA's Decision As To The Upper ½ Mile Reach Removal Action Is Not Arbitrary

Church and HEAL/Harrison-Russell argue that the Consent Decree should not be entered because, they assert, the cleanup for the Upper 1/2 Mile Reach is inadequate.[29] Particular arguments raised include the following: the desire for more extensive sediment removal; the view that a slurry ditch would be a preferable component of the removal action; and the contention that providing a 'capping' component of this action is not advisable. Each of these

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[26] Church Opposition at 2-6; Church Intervention at 35-36; HEAL/Harrison-Russell Opposition at 2.

[27] The term "treatment" as set forth above and in Comment Response 40, includes thermal desorption as well as other available treatment alternatives.

[28] Church Intervention at 22; Church Opposition at 23-27.

[29] Church Intervention at 22; Church Opposition at 12-16.

issues were considered by EPA both before the selection of the clean-up and in connection with evaluation of comments to the Decree. As set out in Section III.F and H of the Comment Responses, in particular Comment Responses 58-60 and 62-65, EPA's decisions are technically supportable and should be accepted by this Court.

6. Reliance On Spatial Averaging Is Technically Supported

Church argues that the Consent Decree is technically flawed, and therefore not reasonable, because it permits the use of spatial averaging in testing for PCB contamination.[30] EPA's decisions concerning the sampling regime are supported by the conditions at the Site and the Administrative Record. This argument is discussed in detail in Comment Response 53.

7. Intervenors Misunderstand The Applicability of the TSCA Spill Cleanup Policy

HEAL/Harrison-Russell incorrectly argues that, in setting site cleanup standards, EPA has not complied with regulations regarding PCB spill cleanups promulgated under the federal Toxic Substances Control Act ("TSCA") found at 40 C.F.R. § 761.125(c)(4).[31] The so-called "Spill Cleanup Policy" expressly states that the policy applies to PCB spills that occur after

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[30] Church Intervention at 22.

[31] HEAL/Harrison-Russell Opposition at 2-3. HEAL/Harrison-Russell cites the regulation as 40 C.F.R. § 761.25(c)(4). There is no such regulation. HEAL/Harrison-Russell is apparently citing to the PCB Spill Cleanup Policy promulgated pursuant to TSCA at 40 C.F.R. § 761.125.

May 4, 1987.[32] See 40 C.F.R. § 761.120(a).[33]

PCB spills not covered by the Spill Cleanup Policy are regulated under TSCA pursuant to regulations for the cleanup and disposal of PCB remediation waste found at 40 C.F.R. § 761.61. See 63 Fed. Reg. 35406 - 35407. The applicable regulation provides three regulatory avenues for PCB cleanup. One of these methods is a risk-based approval whereby the EPA Regional Administrator approves a cleanup if the Administrator finds that the cleanup "will not pose an unreasonable risk of injury to health or the environment." 40 C.F.R. § 761.61(c). This method allows EPA to set site-specific cleanup levels based upon appropriate sampling and risk evaluations.

The EPA Regional Administrator for Region 1 made a finding pursuant to Section 761 in the August 4, 1999 Action Memorandum for the Removal Actions Outside the River (Decree, Appendix D, p. 41). EPA has also stated it will comply with the provisions of the risk-based TSCA regulations at Section 761.61(c) because such provisions are considered an applicable or relevant and appropriate requirement ("ARAR"). See *Statement of Work for Removal Actions Outside the River*, Decree Appendix E , Technical Attachment B; *Removal Action Work Plan for Upper ½ Mile Reach*, Tables 2-1 to 2-3. Compliance with the risk-based method is also

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[32] The Spill Cleanup Policy is a policy and not a binding regulation. See 63 Fed. Reg. 35407. The Policy is also inapplicable to the GE cleanup because the Policy, by its terms, does not apply to spills that migrate to and contaminate surface waters before a cleanup is complete. 40 C.F.R. § 761.120(d)(2)(iv).

[33] Because the Spill Cleanup Policy only applies to spills occurring after May 4, 1987, the Policy's application to the response actions under the Decree is for new PCB spills, if any, that may occur during the performance of the cleanup. See *Statement of Work for Removal Actions Outside the River*, Decree Appendix E ,Technical Attachment B; *Removal Action Work Plan for Upper ½ Mile Reach*, Tables 2-1 to 2-3.

proposed for the 1 ½ Mile Reach Removal Action. See *Final Draft Engineering Evaluation/Cost Analysis for the Upper Reach of the Housatonic River*, Appendix C. As for the Rest of the River, EPA intends to comply with TSCA and its regulations in the Rest of the River Remedial Action, which EPA will formulate only after public comment.

Thus, EPA's decisions are not arbitrary, capricious or otherwise not in accordance with law, including TSCA.

8. EPA Had Adequate Information Relating To PCB Contamination And Continues To Collect Such Information

Church argues that GE consistently under-reported the amount of PCBs being disposed of in Pittsfield and misinterpreted the contamination levels in the River, which Church claims is a violation of the 1981 RCRA Administrative Consent Order.[34] Church also states that independent testing performed by EPA and MADEP revealed large areas of previously undiscovered contamination. Church does not directly say why these facts, even if true, suggest that the Decree is not fair, reasonable, consistent with CERCLA, RCRA or the Clean Water Act, or in the public interest. The settlement provides for additional investigation and excludes from the covenants not to sue areas that are not investigated or cleaned up. Thus, the settlement satisfies the criteria for entry.

The United States considered and addressed the issue relating to its efforts to determine the scope of contamination in Comment Response 69. EPA has gathered a very large amount of contamination information over the past several years. EPA has performed, or required GE to perform, very extensive sampling on areas of the Site, including the GE facility, Unkamet

[34]Church Opposition at 9-12.

Brook, the Former Oxbow Areas, Silver Lake, and residential properties in the River floodplain. The extensive sampling has informed EPA's decisions concerning response actions at the Site. [35] Sampling required under the Decree will continue to inform EPA's decisions.

With respect to contamination not yet discovered, the covenants not to sue are limited to areas of the Site investigated or remediated. The Site, while large, is limited. GE can be pursued for cleanup of areas outside the scope of the Site. Further, if unknown conditions or new information are discovered at the Site there are reservations so that GE can be required to perform or pay for clean-up required to address the new conditions/informaion. See Comment Response 66. In short, the Consent Decree is reasonable and protects the public interest with respect to unknown conditions.

Additionally, the proposed Decree contains requirements regarding future reporting of contamination by GE. For example, pursuant to Paragraph 51 of the Decree, GE must submit to EPA and MADEP copies of "the results of all sampling and/or tests or other data obtained or generated by or on behalf of [GE] with respect to the Site and/or the implementation of this Consent Decree unless [EPA and MADEP] agree otherwise". Also, pursuant to Paragraph 52 of the Decree, the United States retains all its "information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations". Accordingly, the proposed Decree incorporates rquirements to obtain and submit information to EPA and MADEP so that the Agencies can continue to evaluate Site conditions.

In conclusion, the Oppositions generally argue that the clean-ups selected by EPA are not

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[35]See, e.g., Decree Appendix D, pp. 6-20.

protective of human health and the environment. Church Opposition at 6, 8-27, 31-35; Moldmaster Opposition. As discussed above, for each cleanup action selected or to be selected, EPA has conducted or will conduct risk evaluations to determine protective clean-up standards; considered all available information; and considered the available clean-up technologies. The Oppositions fail to offer affidavits of experts or other plausible support to conclude that EPA erred in its findings and decisions. The Oppositions fail to provide any basis to conclude that EPA's cleanups are not protective, particularly in light of the deferential review afforded the technical decisions of EPA under CERCLA.[36]

D. The Natural Resource Damages Component of the Consent Decree Is Reasonable. The Oppositions Demonstrate The Intervenors' Failure To Review All Of The Information That Supports The NRD Settlement And That Has Been Made Available To Them And The Public By The Agencies And The Trustees

The challenges to the NRD settlement presented by the Church and HEAL/Harrison-Russell Oppositions (Church Opposition at 38-52, HEAL/Harrison-Russell Opposition at 4-6), are simply a rehash of issues that have previously been responded to and rely entirely on the

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[36] In addition to the technically based assertions addressed above, HEAL/Harrison-Russell argues that the Consent Decree should not be entered because the Decree fails to address PCB contaminated wood distributed by GE for use by Pittsfield residences or businesses or earthen floors that may be contaminated with PCBs. These issues have been considered and addressed by the United States in Comment Response 66.

Church also argues that the Consent Decree should not be entered because of ongoing public health studies that they assert could impact the selected clean-ups. This issue also has been considered and addressed by the United States; the Court should approved the settlement so that the proposed clean-ups can go forward. Comment Response 55.

A final argument raised by Church is that because of the possibility of recontamination, allegedly without recourse against GE, the Decree is not reasonable and should not be entered. Church Intervention at 31, 33. Recontamination was an issue of deep concern to the Agencies that received considerable thought. The clean-ups to be implemented under the settlement minimize any risk of recontamination. See Comment Responses 58-60.

misrepresentation of a selected string of excerpts taken from the Trustees' Preliminary Natural Resource Damage Assessment ("PNRDA") (Exhibit 9 to Memorandum in Support). The Oppositions have failed to thoroughly review the PNRDA and to take into consideration the results of supplemental analyses conducted by the Trustees and presented in Exhibit 10 to the Memorandum in Support. The Oppositions ignore the extensive responses to comments which clearly explain all of the elements of the NRD component of the settlement, including the selective set of elements challenged by the Oppositions. See Memorandum in Support at 41-42, 64-71 and Comment Response, Section IV, at 129–150. The NRD component is substantively fair and reasonable since it provides adequate compensation for the NRD claims.

1. The Oppositions Mischaracterize the PNRDA

The Oppositions have assembled a string of excerpts from the PNRDA and would like the Court to believe that these excerpts show that the Trustees relied upon a paucity of data, information and analysis to negotiate the NRD component of the settlement. Church Opposition at 40-50, HEAL/Harrison-Russell Opposition at 4. The Court should not be mislead by the Oppositions' misrepresentations and their failure to review and consider all of the information available to them. The PNRDA, as clearly explained in the Response to Comments, was only one of several tools used in negotiating the NRD component. See Memorandum in Support and Comment Response, Section IV at 131-133. The PNRDA was completed in January of 1997 at the very early stages of the negotiations and was quite thorough at achieving the objectives of identifying, *inter alia*, existing data, data gaps, potential categories of damages, the affected public and stakeholders, and the outside range of potential damages –"a ballpark estimate of damages sufficient for settlement and planning further research, but not for trial." *Id* at 131.

Accordingly, the Trustees then used the results and recommendations of the PNRDA to further focus extensive supplemental NRDA analyses during 1997.

The supplemental NRDA analyses were designed to address, for settlement purposes, those areas of NRD that merited further evaluation and that needed more development in order to responsibly capture the realistic range of NRD. The supplemental analyses focused on three categories of NRD: (1) ecological service losses (sediment, biota, fish, birds, etc.); (2) direct human use service losses (primarily recreational fishing and boating); and (3) passive human use service losses (i.e., aesthetics, wildlife viewing, other outdoor activity). See Exhibit 10 to Memorandum in Support. Many of the limitations identified in the PNRDA, relied on in the Oppositions, were specifically covered by the supplemental NRD analyses. The results of these efforts were then used in conjunction with the PNRDA and consideration of other critical factors (such as proposed response actions and litigation risks) to negotiate the NRD component beginning in December of 1997.

The overall results of the PNRDA and the supplemental NRDA analyses were comprehensively presented to the public on October 21, 1998 in Lee, Massachusetts and made available to the public in a 75+ page package of material. This material is included as Exhibit 10 to the Memorandum in Support. After the October, 1998 presentation, Trustee representatives attended several Citizen Coordinating Council meetings to explain the NRD component and also conducted several separate NRD specific meetings, that were requested by interested members of the public and environmental organizations in the Housatonic River region, to explain and

discuss the NRD recovery and the NRD assessment process.[37]

Notwithstanding the availability of these materials and the opportunities offered by the Trustees to discuss the NRD-related issues, the Oppositions rely on selected excerpts from the PNRDA highlighting the limitations of that preliminary analysis. The Oppositions fail to address or even take into consideration any of the supplemental material that has been provided. The Oppositions have also failed to consider the extensive responses to comments. In these materials, substantially all of the issues rehashed by the Oppositions have been evaluated, addressed, and substantively explained with care. See Memorandum in Support and Comment Response, Section IV at 129–150. Some of the most glaring and obvious misrepresentations of the Oppositions with respect to the NRD component are discussed briefly below.

A general theme throughout the Oppositions is that with additional research on human use and ecological service losses the NRD claims would increase in magnitude or that the larger damages figures in the initial broad range of estimates in the PNRDA would be substantiated. Church Opposition at 39, 41–42, 50–51; HEAL/Harrison-Russell Opposition at 4–5. Although further research on these subjects would have provided additional information, this assertion oversimplifies the significant challenges the Trustees would have faced in conducting injury and damage studies at this particular Site. See Memorandum in Support and Comment Response, Section IV at 134–139. It also incorrectly assumes that more research necessarily leads to proof

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[37] One such meeting was held in Connecticut in April of 2000 with members of the HEAL/Harrison-Russell Group. A follow-up meeting was scheduled to be held in May of 2000, but had to be postponed due to the HEAL/Harrison-Russell Group's filing of their motion to intervene which necessitated the need to work through their counsel of record. Since that time several standing offers have been extended by the United States to the HEAL/Harrison-Russell Group through their counsel (immediately after their motion to intervene and as recently as September, 2000) to have a follow-up meeting on the NRD component without any response.

of greater damages. Id. Demonstrating that PCBs in natural resources lead to ecological injury and reduced public enjoyment is an extremely time consuming and challenging task. Indeed, as evidenced by the materials provided with the Memorandum in Support, the Trustees expended significant resources and effort gathering and analyzing relevant data and information on the ecological injury and economic damages due to PCB contamination in the Housatonic River environment. Conversely, the Oppositions have not provided any credible basis for their argument that additional research would necessarily yield evidence of greater injury or damages.

For example, the extensive focus group work conducted by the Trustees' NRD contractor (after the PNRDA was completed) with both recreational anglers and the general public in Massachusetts and Connecticut revealed evidence that the Trustees' initial estimate of the potential range of recreational fishing and passive use losses in the PNRDA was too broad, and that a costly full scale primary research effort would have only served to confirm a significant tightening of the initial estimates. As a result, the Trustees revised the initial estimate of passive use losses of $25-$250 million downward to a range of $25-$100 million. Similarly, the initial estimate of recreational fishing losses in the PNRDA was $10 to $30 million, but was later revised to $16.7 million. See Memorandum in Support, Exhibit 10; Comment Response at 129–139, 145, 147. Thus, the assertion by the Oppositions that total damages would be in excess of $200 million is simply not supported by the extensive research performed by the Trustees.

The Oppositions also allege that numerous categories of ecological losses were not adequately measured by the Trustees, particularly in light of developing data that shows high levels of PCBs in wildlife (Church Opposition at 42–45), and that certain service losses in Connecticut were not measured or recognized (boating, farming) (HEAL/Harrison-Russell

Opposition at 4). In the supplemental NRD analyses to the PNRDA the Trustees' NRD contractor conducted a Habitat Equivalency Analysis ("HEA") to estimate ecological service losses in the Housatonic River environment due to PCB contamination. In brief, the HEA modeled ecological service losses (as lost habitat acre years) for a broad range of ecological resources including sediment, fish, birds and mammals, in both the river and its associated floodplain in both Massachusetts and Connecticut. The HEA analysis used existing data in conjunction with current literature on the toxicity of PCBs to wildlife, as well as other relevant information and methodologies, to input conservative assumptions into the model in order to compensate for identified data gaps and to capture an all-encompassing estimate of ecological service losses. Thus, developing data showing high levels of PCBs in wildlife are consistent with the conservative assumptions used in the HEA modeling effort and serve more as a validation of the HEA results and not as an indication that ecological service losses have been underestimated. *See* Exhibit 10 to Memorandum in Support and Comment Response at 145, 141–142 (floodplain), 145–146 (efforts in Connecticut), 147. In addition, the analysis was applied in a manner that considered a very broad suite of injuries and damages in both Massachusetts and Connecticut.[38] Thus, the Trustees believe that they responsibly and accurately estimated the potential range of ecological service losses and that the NRD recovery includes adequate compensation for those losses.

Finally, the Oppositions repeatedly argue that the NRD evaluation should have relied more on interviews with local area residents. Church Opposition at 39, 45, 49-50. The Trustees respect and value the extensive local knowledge of both the Housatonic River resource and the

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[38] For example, as part of the passive use analysis, the Trustees' NRD contractor asked respondents to consider a comprehensive program of river cleanup in the focus group interviews. See Exhibit 10 to Memorandum in Support.

public's historic use of that resource. Indeed, both the Trustees and their NRD contractor relied extensively on interviews with the general public, resource managers, and representatives of various stakeholder groups in preparing the PNRDA and the supplemental NRD analyses. See Memorandum in Support, Exhibits 9 and 10; Comment Response at 139–141. However, while anecdotal information, such as that cited in the Church Opposition, regarding past use of Silver Lake can inform an assessment, such anecdotes alone do not form a sufficient basis for an expert judgement of past use levels.[39] See Comment Response at 139–141, 145–146. Therefore, the Trustees are confident that they obtained the appropriate measure of public and local area resident input in the NRD evaluation.

2. The Oppositions' Disregard The Implications Of The Rest of River Remedy And Litigation Risk

Noticeably absent from the Oppositions is any serious consideration of the roles that the response actions and the evaluation of litigation risk played in achieving the settlement. The Church Opposition makes only a passing reference to the "significant remediation package negotiated" (Church Opposition at 50), and the HEAL/Harrison-Russell Opposition presents an egregiously cavalier and unsupported accusation that the United States' decision to enter into the settlement rather than litigate is based on "unfounded fears about the results and involvement of litigation" (HEAL/Harrison-Russell Opposition at 5) . Nothing could be further from the truth.

During the negotiations the Trustees were presented with the opportunity to put into motion one of the objectives Congress set out in passing CERCLA in terms of coordinating response actions with the restoration of injured natural resources. The Trustees have acted on

[39] For example, researchers who study recreational behavior have found that the public finds it difficult to recall the number of times that they fished in the past twelve months. See also Comment Response at 146.

that opportunity in the proposed Consent Decree in a manner that has combined the recovery of significant damages with the coordinated participation of the Trustees in ongoing and future response actions. This approach has been clearly and carefully articulated and supported in the proposed Consent Decree and in the Memorandum in Support. See Memorandum in Support at 64-65, 70–71, fn. 58; and Comment Response at 132, fn. 61 and 62. The Oppositions have presented nothing to support their flagrant denunciation of the NRD component of the settlement. What is clear from the record supporting the proposed Consent Decree is that the response actions are an important and significant component of the NRD recovery that make it fair, reasonable and adequate compensation for the NRD claims.

With respect to litigation risk, the HEAL/Harrison-Russell accusation that the United States has unfounded fears about the results and involvement of litigation with respect to the NRD claims is simply irresponsible. The HEAL/Harrison-Russell Opposition offers absolutely no substantiation, analysis or case law in support of this accusation. The United States, however, has carefully analyzed and evaluated the litigation risks associated with the NRD claims in this action as required by CERCLA. In re Acushnet River & New Bedford Harbor, 712 F. Supp. at 1036 (CERCLA "requires the United States to assess the strengths and weaknesses of its case and drive the hardest bargain that it can."). See also Memorandum in Support at 67–71, Comment Response at 129–139. The HEAL/Harrison-Russell Opposition's accusations on NRD litigation risk are baseless and should be disregarded by the Court.[40]

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[40] The Oppositions have also objected to the adequacy of the NRD component of the settlement based on their alleged unanswered requests to the Trustees for the underlying data and analyses performed by the Trustees' NRD contractor. The Oppositions seem to be hoping to persuade the Court that there is additional data that the Trustees' are hiding that establishes that the NRD recovery is insufficient. The Trustee for the Commonwealth of Massachusetts has recently released additional materials related to the NRD evaluation in response to the information requests. See Massachusetts Reply and attachments thereto. The fact remains,

In summary, the Oppositions have failed to demonstrate or articulate any substantive basis why the NRD component of the settlement is not substantively fair, reasonable, consistent with the purposes of CERCLA, and in the public interest.

E. The Decree Should Be Entered Because It Is Consistent With CERCLA, RCRA and the Clean Water Act

Church and HEAL/Harrison-Russell argue that the Consent Decree should not be entered because the government should have characterized the "removal" actions at the Site as "remedial" action.[41] Thus, they argue the United States does not have the authority to incorporate such work into the settlement. This argument has been considered and addressed by the United States in Comment Response 25 and in the Memorandum in Support of Entry at 73-80. EPA's cleanup decisions are consistent with CERCLA and the NCP. The settlement is also consistent with RCRA and the Clean Water Act. Therefore, the Consent Decree should be entered.

The statute vests EPA with the discretion to choose between the broad and overlapping

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though, that while these materials may provide more voluminous backup to the PNRDA and the supplemental analyses, they are largely duplicative of the material already provided in the PNRDA and the comprehensive summary of the PNRDA and the supplemental analyses made available in October of 1998. In short, the relevant and critical information relied upon by the Trustees was made available to the public two years ago. The Intervenors have simply failed to review that information. Thus, the Court should not be distracted by the Oppositions' misleading allegations that the Trustees have failed to release critical information.

Further, the HEAL/Harrison-Russell Opposition cites to a "statement" by HEAL's president dated October 1, 2000 that is attached to the Opposition. The statement makes clear that HEAL's interest in this action, its existence, and its requests for participation and information did not arise until after the Consent Decree was lodged-- long after the supplemental NRD analyses material had been made available to the public in October of 1998, and several years after the settlement negotiations and NRD evaluation process, and during which time period significant efforts had been made by governments to obtain public input and participation on both cleanup and NRD issues.

[41] Church Intervention Brief at 35-36; Church Opposition at 2-8; HEAL/Harrison-Russell Opposition at 2.

categories of remedial or removal action, yet the two types of response actions remain distinct. At this very Site, EPA has drawn a distinction as to the type of response actions to be implemented: the Rest of River cleanup will be undertaken as a remedial action, and the remainder of the Site will be addressed through a series of removal actions. See Comment Response 25 for a discussion of the basis for the distinction between the Rest of River Remedial Action and the Removal Actions. Further, EPA's decision to utilize removal actions for the areas other than the Rest of River is subject to judicial deference. See Comment Response 25 at 43-46. United States v. Vertac, 33 F. Supp. 2d at 783 (court defers to EPA's technical expertise in choosing between remedial or removal action under the arbitrary and capricious standard as required by Section 113(j) of CERCLA). There is no basis here to overturn EPA's well founded analysis of the NCP factors in determining prompt action is appropriate for portions of this Site.

Church also erroneously argues that the decision to select removal action at the Site is based upon a false urgency. Church Opposition at 3, 4. Church offers no sampling data or other support to rebut EPA's determination that removal actions are appropriate for certain portions of the Site. For each removal action selected, EPA documented a threat to public health, welfare or the environment within the meaning of the NCP, and made a determination that removal action was appropriate after consideration of the criteria for removal action set forth in Section 415(b)(2) of the NCP. See Comment Response 25. Church has not cited a single case where EPA determined a need for removal action based upon an analysis of the relevant NCP factors -- and the court disagreed.

Contrast the cases cited by Church to the facts in this matter. In Channel Master Satellite Sys., Inc., 748 F.Supp. 373, 379-80 (E.D.N.C. 1990), the Court found that "[the private party] did not utilize, nor did it reference, any federal regulations in preparing the cleanup plan.

It did not make any effort to comply with the NCP in the cleanup plan ...." (Emphasis in original). Similarly, in Sherwin-Williams Co. v. City of Hamtramck, 840 F.Supp. 470 (E.D. Mich. 1993), a municipality failed to establish the need for prompt action based upon the NCP factors.[42] Likewise, in State of Minn. v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1024 (8th Cir. 1998), the Minnesota Pollution Control Agency (EPA was not involved at this stage in the matter) failed to evaluate the factors set forth in the NCP for removal actions. Here EPA considered such factors, and the Oppositions do not allege that EPA failed to do so.

Finally, Church reiterates concerns expressed during the comment period that procedural protections required of remedial actions are not required of removal actions. No one alleges that EPA failed to comply with the procedural requirements for removal actions. Further, EPA has provided more opportunity for public participation than is required by law, regulation or policy. See Comment Response 25; Exhibit 8 to Memorandum in Support. The public has been informed and consulted every step of the way.

In short, EPA's determination regarding seletion of removal or remedial actions is consistent with CERCLA and the NCP. This Court should defer to EPA's well founded decision to undertake prompt action at the Site and approve the Decree.

F. The Decree Is In the Public Interest And Should be Entered

The final criterion to be evaluated for entry is whether a settlement is in the public interest. HEAL/Harrison-Russell question GE's commitment to the proposed Decree in light of

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[42] Church notes that the court in Sherwin-Williams quotes from Amland Properties Corp. v. Alcoa, 711 F. Supp 784 (D.N.J. 1989). Amland Properties supports entry of the Decree. In that case, the plaintiff had undertaken remedial and removal action at the site. With respect to the removal actions, the court only disallowed costs for those activities taken before the discovery of contamination because they could not have been in response to contamination. Where the removal action was in response to contamination and consistent with the NCP, it was upheld.

positions taken by GE in different contexts. Specifically, HEAL/Harrison-Russell point to the comments GE recently submitted on the proposed 1 ½ Mile Reach Removal Action, as well as reported efforts by GE to lobby Congress for (1) "reform" of the natural resource damage assessment process; and (2) limitation on river dredging. Based on those actions, HEAL/Harrison-Russell allege that GE's commitment to the Decree is "on paper only." HEAL/Harrison-Russell Opposition at p. 6. This argument does not directly address the questions of fairness, reasonableness, or consistency with the statutory objectives. At most, the HEAL/Harrison-Russell argument suggests the Consent Decree is not in the public interest. That suggestion is without merit.

GE has consented to entry of the Decree. If the Decree is entered, GE is required to complete its obligations under the Decree. If GE fails to perform its obligations under the Decree, the United States has numerous options to address such lack of performance, including the use of stipulated penalties, Decree Section XXV, the ability to 'take over' the cleanup work and have GE pay for such work, Decree Paragraph 178, and the reservation of additional enforcement rights in the event of noncompliance, Decree Paragraph 175.a. Moreover, the covenants not to sue GE in the Decree are conditioned on satisfactory performance by GE of its Decree obligations, Decree Paragraph 161.e. In light of such protections, GE's "paper" commitment represents a set of enforceable obligations, and thus a settlement in the public interest. GE's political activities do not negate or in any way affect GE's contractual obligations under this Decree, and as such need not be addressed in connection with a decision to enter the Decree.

With respect to the specific allegations by HEAL/Harrison-Russell concerning the 1 ½ Mile Reach Removal Action, EPA, consistent with CERCLA and the proposed Decree

(Paragraph 21), provided the public, including GE, with a period for public comment on the proposed removal action for the 1 ½ Mile Reach.[43] GE and other members of the public submitted comments. GE's participation in the comment process does not affect its obligations to perform work under the Decree.

In addition, pursuant to the proposed Decree, GE has already begun performance of the response actions required under the Decree. Pursuant to Paragraph 16 of the Decree, GE has performed significant response actions as a contractual obligation. For example, GE has completed the Allendale School Removal Action. GE initiated the Upper ½ Mile Reach Removal Action in October 1999 and is currently performing that cleanup. GE also is performing ongoing activities to control the sources of contamination in several areas of the Site. See Decree, Paragraph 16.a; Exhibits 3.2 and 3.3 to Memorandum in Support; and Comment Responses 58-60.

Thus, there can be no question but that if the Decree is entered GE will be on the hook to perform each and every obligation required by the settlement. The Decree is in the public interest and should be entered.

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[43] EPA held a formal comment period on EPA's proposed cleanup plan for the 1 ½ Mile Reach Removal Action from July 17, 2000 through September 1, 2000. During the comment period, EPA held public meetings in Pittsfield on July 25, 2000, and in Kent, Connecticut on August 9, 2000. EPA held a formal public meeting on August 15, 2000 to accept oral comments on EPA's cleanup proposal.

III. Conclusion

The Consent Decree executed by the United States, Massachusetts, Connecticut, the City, PEDA and GE is a fair and reasonable resolution of claims against GE, comports with the objectives of CERCLA, RCRA and the CWA and is in the public interest. The oppositions to entry of the Decree fail to show that entry of the Decree is improper, inadequate or not in the public interest. The Court should defer to the agreements reached in the Decree, approve the settlement and enter the Decree as a final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2000, I caused copies of the foregoing document to be served on counsel to the parties to this action by hand or overnight delivery.

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